

**U.S. Department of Labor**

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DATE: June 20, 2000

CASE NUMBER: 2000-STA-11

*In the Matter of:*

**JERRY A. METHEANY,**

*Complainant,*

vs.

**ROADWAY PACKAGE SYSTEMS, INC.,**

*Respondent.*

Appearances:

Jerry A. Metheany  
W & P Trucking  
10278 Sheldon Road  
Elk Grove, CA 95624

*pro se*

Gary D. Dunbar, Esq.  
Associate General Counsel  
FedEx Ground Package System, Inc.  
P.O. Box 108  
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*for the Respondent*

## **RECOMMENDED DECISION AND ORDER**

### **I. Jurisdiction**

This case arises from a complaint filed by Jerry A. Metheany under the employee protection provisions of section 405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, and the implementing regulations at 29 C.F.R. Part 1978, which protect employees from discharge, discipline or discrimination for engaging in a protected activity pertaining to commercial motor vehicle safety and health matters. The case is before me on objections filed by Mr. Metheany to the findings and preliminary order of the Assistant Secretary of Labor for Occupational Safety and Health (the Assistant Secretary) after investigation of Mr. Metheany's complaint. 49 U.S.C. § 31105(b)(2)(A); 29 C.F.R. § 1978.105.

### **II. Procedural History**

Mr. Metheany filed his complaint with the Assistant Secretary on November 19, 1998. He alleged that Roadway Package Systems, Inc. (RPS) violated the STAA in December 1998 by refusing to renew his contract after he complained of commercial vehicle safety violations. The Regional Administrator for the Occupational Safety and Health Administration Region IX found after an investigation that Mr. Metheany's allegations were unsubstantiated, and dismissed the complaint on December 2, 1999. Mr. Metheany filed timely objections and requested a formal hearing before the Office of Administrative Law Judges by letter dated December 22, 1999. Pursuant to notice, a hearing was conducted in Sacramento, California on February 10-11, 2000, at which time all parties were afforded an opportunity to present evidence and arguments. A continuance was granted to allow an additional witness to testify on April 5, 2000. However, Mr. Metheany withdrew his request to question the witness on April 3, 2000, and the parties agreed that it was unnecessary to reconvene. Mr. Metheany and RPS timely submitted post-hearing briefs on May 22, 2000 and the record was closed.

### **III. Issues**

The two issues to be decided are: 1) Whether Mr. Metheany was an "employee" of RPS and therefore entitled to protection under the STAA; and 2) If Mr. Metheany is covered by the STAA, whether RPS took adverse action against him in retaliation for his protected activities.

### **IV. Findings of Fact and Conclusions of Law**

RPS (now FedEx Ground Package System, Inc.), was a duly licensed motor carrier operating in interstate commerce. TR 145.<sup>1</sup> It transports small packages between approximately 350 terminals and hub facilities. Essentially, packages are collected locally at terminals and

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<sup>1</sup>TR refers to Hearing Transcript; CX refers to Complainant's Exhibit; RX refers to Respondent's Exhibits.

brought to regional hub facilities. At the hub facilities, the packages are sorted, trucked to other terminals or regional hub facilities, and delivered. Much of RPS's work is done by independent contractors who provide both local pickup and delivery services and the over-the-road (linehaul) transportation between terminals and hub facilities. RPS has approximately 6,400 contractors for pickup and delivery service, and 1,000 contractors for its linehaul services. TR 147. Mr. Metheany was one such contractor who had four tractors driven by drivers he hired, or on occasion, by him personally.

In February 1992, RPS contracted with Mr. Metheany to provide linehaul services. TR 115. The contract was renewed for three years in late 1994. TR 158-159. Both Complainant's and Respondent's exhibits show that between 1994 and 1998 Mr. Metheany sent numerous letters to RPS, which made suggestions or registered complaints about the way RPS was conducting its business. Mr. Metheany avers that RPS had an "open door" policy which encouraged his correspondence. TR 115. RPS viewed the letters as evidence of Mr. Metheany's dissatisfaction and an increasingly contentious relationship between them. TR 163-165. A May 1998 memo from the RPS Director of Contractor Relations, Bill Breese, indicates that Mr. Metheany's contract would not be renewed when it expired in December 1998 largely because RPS found Mr. Metheany's letters annoying. RX 78.

On July 1, 1998, two of Mr. Metheany's drivers, William Sloan and Joe Rivera, drove a tractor pulling two RPS trailers to Holbrook, Arizona, where the drivers switched trailers with a tractor from Fort Worth, Texas in order to pull those trailers to Sacramento on their return trip.<sup>2</sup> TR 29. After the switch, the brakes on the front trailer locked up. The drivers contacted Mr. Metheany and J.W. Gurtis, the RPS Linehaul Manager in Sacramento, at around 3:00 or 4:00 a.m. on July 2, 1998. TR 30-35. Mr. Gurtis authorized the drivers to contact an independent mechanic from the Holbrook area. The mechanic determined that a replacement part was needed, but the nearest part was five hours away in Phoenix, Arizona.

Without Mr. Metheany's knowledge, Mr. Gurtis directed the mechanic and drivers to disable the brakes on the trailer, and to place this brakeless and heavier trailer behind the trailer with good brakes. The drivers pulled the two trailers over 800 miles from Holbrook, Arizona to Sacramento, California. TR 36. Federal Motor Regulations prohibit operation of a trailer with disabled brakes. TR 46. Several weeks after the Holbrook incident, RPS fired Mr. Gurtis and disqualified Mr. Metheany's two drivers from driving for RPS.

Mr. Metheany claims that he confronted Mr. Gurtis about the Holbrook incident on July 2, 1998, and that thereafter RPS withdrew its previous offer of an additional route. Mr. Metheany testified that he reported this violation to the Federal Highway Administration by facsimile on July 5, 1998. TR 123; CX 70. On November 16, 1998 Mr. Metheany sent a letter to Eric Campbell, the RPS Sacramento Linehaul Manager, complaining of yet another commercial safety violation

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<sup>2</sup>For the sake of brevity, hereafter this event will be referred to as the "Holbrook incident."

concerning a different RPS contractor. CX 92. On November 19, 1998, RPS gave official notice to Mr. Metheany that his contract would not be renewed. CX 80.

Mr. Metheany contends that the withdrawal of the additional route offer, the disqualification of his two drivers, and RPS's failure to renew his contract were taken in retaliation for his complaints about the Holbrook incident and other safety violations. RPS contends that Mr. Metheany is an independent contractor and is not covered by the STAA, and that in any event RPS did not violate the STAA, because the decision not to renew Mr. Metheany's contract was made prior to the July 2, 1998 Holbrook incident.

A. Coverage by the STAA

STAA section 405(a) provides that no person shall discharge any "employee" because such "employee" has filed any complaint relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C. app § 2305(a).

An "employee" is defined by the STAA as a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual who is not an employer, who directly affects commercial vehicle safety in the course of employment by a commercial motor vehicle carrier. 49 U.S.C. § 31101(2).

Mr. Metheany contends that he was at all times an employee since he was a driver of a commercial motor vehicle having a gross vehicle weight exceeding 10,000 lbs, and that in the course of his employment for RPS he directly participated in interstate commerce and directly affected commercial vehicle safety.

There is evidence that Mr. Metheany did personally drive a truck occasionally. See Mr. Metheany's March 29, 1995 and June 2, 1998 letters to RPS. CX 17, 54. There is no question that he was covered by the STAA when he drove. The statute specifies that independent contractors are covered when they are personally operating a commercial motor vehicle. Implicit is the notion that independent contractors are not "employees" under the STAA when they are not personally driving. Mr. Metheany was not personally operating a commercial motor vehicle during the Holbrook incident, or during the incident he wrote about on November 16, 1998.

Mr. Metheany does not claim to have been a mechanic or freight handler. The remaining category under the STAA's definition of employee is "an individual not an employer, who directly affects commercial vehicle safety." 49 U.S.C. § 31101(2). An "employer" is defined as a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce. 49 U.S.C. § 31101(3)(A). Mr. Metheany owned four tractors, and hired numerous drivers to operate his commercial motor vehicles. TR 115, 74, 152. Therefore, I find that Mr. Metheany was an employer and thus cannot fall into this category.

Although, the language of the contract is not necessarily controlling, it is noteworthy that the language of the RPS operating agreement with Mr. Metheany clearly indicates that the parties did not consider Mr. Metheany an employee. The contract states: “Both RPS and Contractor intend that Contractor will provide . . . services strictly as an independent contractor, and not as an employee of RPS for any purpose.” RX 118 at 295.

In *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992), an ERISA<sup>3</sup> case, the Court articulated a common law test to determine whether a person is an employee or independent contractor. This test has been held applicable to various environmental whistleblower statutes which provide little or no definition of “employee.” See *Reid v. Secretary of Labor*, 106 F.3d 401, (6<sup>th</sup> Cir. 1996). While the STAA provides a definition of employee, it may be appropriate to briefly analyze Mr. Metheany’s working relationship with RPS using the applicable *Nationwide* factors. Under the general common law the important factors to consider are the hiring party’s right to control the manner and means by which the product or service is accomplished. Other factors are the skill required; the source of the instrumentalities and tools; the location of the work; the permanency of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provisions of employee benefits; and the tax treatment of the hired party.

The contract between RPS and Mr. Metheany specified that RPS personnel would have no authority to direct him as to the manner or means employed to achieve RPS business objectives. Mr. Metheany was responsible for determining how many hours he or his drivers worked, whether or when to take breaks, what route to follow and other details of performance. RX 118 at 312. Mr. Metheany and his drivers relied on their judgment, knowledge of traffic patterns and road conditions, and map reading skills. However, this type of work is routine among drivers and is not indicative of independence and non-employee status. See *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5<sup>th</sup> Cir. 1978).

RPS required Mr. Metheany to provide his own tractor for pulling RPS trailers. In fact, Mr. Metheany provided four tractors for RPS routes. TR 115, 151. He was also responsible for the costs and expenses incident to ownership of the tractors such as maintenance, fuel, oil, tires, repairs, business taxes, consumption and sales taxes, valorem taxes, fuel and road-use taxes, ton-mile taxes, insurance, workers’ compensation assessments, license and vehicle registration, renewal fees, and highway and bridge tolls. TR 70, 71; RX 118 at 297. Thus Mr. Metheany provided the instrumentalities necessary for transporting RPS’s packages.

Mr. Metheany’s relationship with RPS was not contractually permanent. However, it could have lasted for many years. Mr. Metheany first signed a contract with RPS in 1992. A new

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<sup>3</sup>Employee Retirement Income Security Act of 1974.

contract was executed in 1994 and renewed in 1997. Thereafter it was renewable in one year increments. The contract only required Mr. Metheany to pick-up and deliver on days and at times which were compatible with his schedules. RX 118 at 301. Mr. Metheany believed that the operating agreement gave him the discretion to refuse runs. *See* CX 54.

Mr. Metheany had responsibility for transporting RPS trailers between certain hubs and terminals. With that responsibility came the discretion to hire and assign any qualified drivers to those runs. In practice, this meant that Mr. Metheany's intended drivers applied to RPS. RPS conducted orientation and training, and arranged for drug screening. TR 40-42, 68. Mr. Metheany determined how much his drivers would be paid, assigned them to RPS routes, and took responsibility for their actions. TR 58; RX 6, 10, 48, 54, 66. Although his drivers reported to RPS dispatchers and hub managers, and wore RPS uniforms, he had his own company name, business phone number, and letterhead. TR 38-39, 157, RX 61. There is no provision in the operating agreement entitling Mr. Metheany to any fringe benefits, pension, retirement, profit sharing or any other benefits. Mr. Metheany was compensated by RPS on a Form 1099 making him responsible for any federal payroll taxes.

On balance, I conclude that these factors point to the conclusion that Mr. Metheany was an independent contractor, and that when he was not personally operating a commercial motor vehicle he was not an employee of RPS. He provided the instrumentalities for his services, maintained a separate business identity to control his trucks and drivers, and insisted on having the authority to refuse RPS runs. Therefore, during the times that he was not driving he was not covered by the STAA.

**B. Whether RPS Retaliated Against Mr. Metheany in Violation of the STAA**

Even assuming that Mr. Metheany was covered by the STAA, he has failed to show that RPS retaliated against him for his protected activity.

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STa-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity; (2) that the respondent was aware of the activity; (3) that he suffered adverse employment action; and (4) the existence of a "causal link" or nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

Mr. Metheany claims that RPS retaliated for his report of safety violations in three ways: 1) By withdrawing an offer of an additional route and to participate in RPS “triples” operations; 2) By disqualifying his drivers after they pulled the RPS trailer with disabled brakes on July 2, 1998; and 3) By not renewing his contract. RPS contends that there is no causal connection between RPS’s adverse actions and Mr. Metheany’s protected activity.

1. Withdrawal of the Triples Operation Offer

A “triples run” consists of a tractor pulling three trailers rather than the usual two. This requires a more powerful tractor than conventional tractors, and specially qualified drivers. *See* CX 57; 62. RPS had been planning to initiate triples runs where feasible including on routes effecting Mr. Metheany’s assigned runs. Mr. Metheany feared that triples operations would reduce the number of runs available to him and the other contractors who were pulling only double trailers, and he expressed his concern to RPS in numerous letters. CX 47, 50, 52, 55, and 56.

On June 12, 1998, Mr. Gurtis, the Sacramento Linehaul Manager, sent a notice to Sacramento contractors indicating that additional triples operations from Reno to Salt Lake City would begin in June or July. CX 58. An undated memo from Mr. Gurtis announced that RPS would conduct triples training classes in the last week of June and the first week of July. CX 62. Mr. Metheany faxed a reply to Mr. Gurtis on June 23, 1998 requesting approval for the triples run so that he could advertise in the newspaper for a driver. CX 63. A handwritten notation on the bottom of the fax indicates that Mr. Gurtis told Mr. Metheany that the Reno run was a “go” and to advertise for a driver. *Id.*; TR 118. Mr. Metheany hired a driver for this run who applied to RPS. TR 118-119. Mr. Metheany faxed the new drivers’ longform physical to Mr. Gurtis on June 30, 1998. CX 65.

Mr. Metheany testified that Mr. Gurtis withdrew the triples run offer an hour and a half after he confronted Mr. Gurtis about the Holbrook incident on July 2, 1998. TR 120. However, this testimony about the time sequence is contradicted by Mr. Metheany’s own exhibits. The most serious discrepancy occurs in the facsimile that Mr. Metheany sent to the Federal Highway Administration on July 5, 1998. In that report, Mr. Metheany states that he found out about the violation on July 3, 1998, not on July 2. Concerning his knowledge of events on July 2, 1998, Mr. Metheany wrote: “Since I did not hear from RPS or the drivers about this breakdown my presumption at this point was that the trailers had been repaired and the truck was back on the road.” CX 70 at 125. Mr. Metheany also wrote that his drivers returned the following day on July 3, 1998, and informed him at that time about the safety violation. *Id.*

Since Mr. Metheany wrote this complaint merely two days following the Holbrook incident, I give more weight to this report than his testimony almost two years later.

Mr. Sloan testified that he contacted Mr. Metheany upon his return to Sacramento from Holbrook on July 3, 1998, and he believed that Mr. Metheany was unaware of the incident up to

that point. In response to Mr. Metheany's direct examination, Mr. Sloan stated: "You were shocked that we - that what had happened. You apparently didn't know. You weren't appraised of the sequence of events, as I had been told you were. So you were shocked and alarmed that we had driven a disabled trailer back to Sacramento." TR 50.

That Mr. Metheany found out about the brake incident on July 3, rather than the previous day, is further supported by his letters to RPS on July 2, 1998. On that date he wrote letters to Mr. Breese and Fred Smith, CEO of FedEx, complaining about the withdrawal of the triples operation. CX 68, 69. Mr. Metheany does not mention the Holbrook incident in either of these two letters. Instead he expresses outrage that RPS believes that he is unhappy with his relationship with RPS. *Id.* With Mr. Metheany's demonstrated history of letter-writing to RPS officials, it is difficult to believe that he would not have mentioned the Holbrook incident in any of his July 2, 1998 letters if he had known about it. On July 7, 1998, Mr. Metheany wrote another letter to Mr. Smith complaining about not receiving the triples run, and again omitted any mention of the Holbrook incident.

Assuming that a triples offer was made to Mr. Metheany, I conclude that the offer was revoked on July 2, 1998 before Mr. Metheany learned about the Holbrook incident on July 3, 1998. Therefore, this adverse action could not have been in retaliation for his claimed protected activity.

## 2. Disqualification of Mr. Metheany's Drivers

Mr. Metheany next contends that the disqualification of the two drivers involved in the Holbrook incident is adverse action taken in retaliation for his July 5, 1998 report of safety violations.

To prevail on a STAA complaint, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under the Act. A complainant initially must show that it was likely that the adverse action was motivated by a protected complaint. The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action. *Roadway Exp., Inc. v. Brock*, 830 F.2d 179, 181 n. 6 (11<sup>th</sup> Cir. 1987).

Under the operating agreement between Mr. Metheany and RPS, the dangerous or careless operation of a commercial motor vehicle resulted in driver disqualification. RX 118 at 307. Mr. Sloan admitted that he knew that it was wrong and foolish for him to drive with a trailer having inoperable brakes. TR 64, 66. It was also his understanding that RPS terminated him for that reason. TR 65. Mr. Sloan spoke with Leonard Revoir, the RPS Sacramento Hub Manager, in order to have his disqualification overturned. However, he was told that because he had transported a trailer with disabled brakes in violation of the rules of the Department of Transportation, that nothing could be done for him. TR 76.



Mr. Rivera, the other driver in the Holbrook incident, testified briefly for Mr. Metheany. Mr. Metheany stated that Mr. Rivera's "story is exactly the same as Mr. Sloan's." TR 110. Therefore, his testimony was deemed cumulative and kept brief. TR 109-110.

The disqualification of Mr. Sloan and Mr. Rivera was in accordance with the operating agreement between Mr. Metheany and RPS. It was even clear to Mr. Sloan that he was disqualified due to his participation in the Holbrook incident. Thus, I find that the disqualification of these drivers was motivated by a legitimate, nondiscriminatory reason. Mr. Metheany has not offered any evidence that the proffered reason was not the true reason for the adverse action.

### 3. RPS's Decision Not To Renew Mr. Metheany's Contract

Section 405 of the STAA was enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles and to protect these "whistle-blowers" by forbidding the employer to discharge, or to take other adverse employment action, in retaliation for their safety complaints. *Brock v. Roadway Express, Inc.*, 481 U.S. 250, 258, 262 (1987); 49 U.S.C. app. §§ 2305(a), (b). The STAA does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. *See, e.g., Newkirk v. Cypress Trucking Lines, Inc.*, Case No. 88-STA-17, Sec. Final Dec. and Order, Feb. 13, 1989, slip op. at 9; *cf. Lockert v. United States Dept. of Labor*, 867 F.2d 513, 519 (9th Cir. 1989). To prevail under the STAA, the employee must establish that the employer discharged him because of the protected whistleblowing activity. *Newkirk*, slip op. at 8-9.

On November 16, 1998 Mr. Metheany wrote a letter to the RPS Sacramento Linehaul Manager, Eric Campbell, informing him of safety violations committed by another driver. CX 92. On November 19, 1998 RPS sent him official notice that his contract would not be renewed in December. CX 80. Mr. Metheany claims this decision was made in retaliation for his November 16, 1998 letter.

RPS offers evidence that the decision not to renew Mr. Metheany's contract was made as early as May 1998. In a May 27, 1998 memorandum from Mr. Breese to Ivan T. Hoffman, Mr. Breese wrote:

Mr. Metheany's letters are becoming longer and more frequent; full of half truths and self serving statements that have no basis in fact and are nothing more than colorful exercises in typing.

. . . In any case, *it is our intention not to renew his contract when it comes up for renewal in December 1998.*

RX 78 (emphasis added).

On June 15, 1998, Mr. Breese wrote another memorandum to Daniel J. Sullivan regarding Mr. Metheany. RX 85. The letter addresses Mr. Metheany's complaints about the RPS triples operation and the idleness of his fourth tractor. Mr. Breese closes the letter by writing:

- We do not intend to renew his contract when it comes up for renewal in December 1998. We can expect arbitration or litigation as a result, but his record will support our decision.

Finally, Mr. Metheany indicates that he tires of responding to my letters and doesn't want to hear from me or Dan Sullivan. Both Tim Edmonds and I have been tired of responding to Metheany's letters for several years.

RX 85 at 228-229.

The decision not to renew Mr. Metheany's contract was apparently not a well guarded secret. In his own letters Mr. Metheany alludes to "rumors" that his contract would be allowed to expire. In his July 2, 1998 letter to Mr. Smith, he writes: "It is now my understanding that my contract will not be renewed in December. Aside from **RUMORS** which I have no control over; I simply do not understand." CX 69 at 122.

In a July 7, 1998 fax sent to Mr. Smith, Mr. Sullivan, Mr. Reggleman, and to Mr. Breese, Mr. Metheany wrote:

RPS indicates that I am "unhappy" and that is the reason the offer to me to operate triples was withdrawn at the absolute last minute. If writing to the CEO makes me an "unhappy" person perhaps now you understand why. I am not unhappy with RPS. I am unhappy with some of the decisions it's managers make and *if bringing these issues up with you warrants my contract not being renewed as I have been made to understand*, well then, at least as a man of conscience has strove to make you aware of these issues.

[sic] CX 72. The issues Mr. Metheany was referring to concern RPS's selection of contractors for its triples operations, and not safety violations. *Id.* Thus it is certain that Mr. Metheany was aware in July 1998 that the renewal of his contract was in doubt.

Two witnesses for Mr. Metheany testified they heard RPS personnel say that Mr. Metheany's contract was being terminated due to his complaint concerning the Holbrook incident. Jeff Kemper, a former driver for Mr. Metheany and former contractor for RPS remembered Leonard Revoir, the Sacramento Hub Manager, say that Mr. Metheany's contract was not renewed due to his complaint with the Federal Highway Administration. TR 87. George Luna, also a former driver for Mr. Metheany and former contractor for RPS, testified that Byron Chin, a RPS linehaul dispatcher, said that RPS was upset that Mr. Metheany had filed the complaint.

However, both witnesses could not remember the dates on which these remarks were made. Mr. Kemper first testified that he heard the remark when he signed his contractor agreement with RPS, which he believed to be in September 1998. TR 87. However, on cross examination he admitted that his contract was signed in September 1997, well before the Holbrook incident. TR 90-94. Mr. Luna believes the remark he heard was made around October 1998. TR 103. Due to the difficulty the witnesses had remembering dates, it is impossible to use their testimony to establish that the decision not to renew Mr. Metheany's contract was made in retaliation for his complaining about the Holbrook incident.

Mr. Metheany insinuates in his closing brief that Mr. Breese's May 27 and June 15, 1998 memorandums are not authentic. Mr. Metheany declined the opportunity to call Mr. Breese as a witness. TR 220. At the close of the second day of the hearing, RPS indicated that it would arrange for Mr. Breese to be available in California in order to testify, or for a post-hearing deposition. TR 220-221. The hearing was continued until April 5, 2000. By his February 29, 2000 letter, Mr. Metheany advised that he had contacted a forensic document examiner in order to challenge the authenticity of RPS letters. However, by his April 3, 2000 letter, Mr. Metheany withdrew his objection to the memorandums of Mr. Breese.

As Mr. Metheany has not presented any evidence to the contrary, Mr. Breese's memoranda which appear to be genuine are uncontroverted and unchallenged evidence that RPS's decision not to renew Mr. Metheany's contract was made at least by May 27, 1998. Thus, I find that the decision not to renew Mr. Metheany's contract was made prior to any of his complaints regarding safety.

In conclusion, I find that Mr. Metheany has failed to establish that the adverse action taken against him was in violation of the employee protection provisions of the STAA.

## **ORDER**

It is recommended that the complaint of Jerry Metheany against Roadway Package Systems, Inc. under the Surface Transportation Assistance Act be dismissed, with prejudice.

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ALEXANDER KARST  
Administrative Law Judge

San Francisco, CA

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S- 4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. *See* 29 C.F.R. §§ 1978.109(a); 61 Fed. Reg. 19978 (1996).